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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 42

THE UNITED STATES OF AMERICA, PETITIONER

v.

SALVATORE FALCONE, JOSEPH FALCONE, HENRY ALBERICO, NICHOLAS NOLE, AND JOHN NOLE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 234–239) is reported in 109 F. (2d) 579.

JURISDICTION

The judgment of the Circuit Court of Appeals reversing the convictions of the respondents was entered March 4, 1940 (R. 241–242). The petition for writ of certiorari was filed April 3, 1940, and was granted May 20, 1940 (R. 243). The jurisdiction of this Court is conferred by Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether one who knows of the existence of a conspiracy to produce distilled spirits in violation of the internal revenue laws, and knowingly provides essential materials by selling them to the conspirators or to their immediate vendors, may be convicted as a coconspirator.

STATUTES INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 332 of the Criminal Code (U. S. C., Title 18, Sec. 550) provides:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procurs its commission, is a principal.

STATEMENT

On October 26, 1938, the five respondents were indicted with sixty-three other defendants in the Northern District of New York (R. 18). The indictment charged, in one count, a conspiracy to violate the internal revenue laws by the operation of twenty-two illicit stills in and near Utica, New York, during a long period prior to October 1938 (R. 7–16). A number of defendants pleaded guilty (R. 20) and the indictment was dismissed as to many others (R. 21). The case was submitted to the jury as to twenty-four defendants; three were acquitted; the respondents and sixteen others convicted (R. 116). The following sentences were imposed upon the respondents: Salvatore Falcone, one year and five months' imprisonment and a $6,000 fine (R. 117); Joseph Falcone, two years' imprisonment and a $7,500 fine (R. 117); Henry Alberico, one year and one day's imprisonment and a $3,000 fine (R. 117); Nicholas Nole, two years' imprisonment (R. 118); and John Nole, one year and five months' imprisonment and a $2,000 fine (R. 118).

On appeal by the respondents and three other defendants, the Circuit Court of Appeals for the Second Circuit reversed the convictions of the respondents and affirmed the convictions of the others (R 241–242). With respect to the latter, who "were all operators of one or more stills," the Court held that the evidence that they were members of a conspiracy to produce illicit liquor "was

ample" (R. 234).[1] But with respect to respondents the evidence was held to be insufficient[2] under the substantive rule of liability which the Circuit Court of Appeals laid down.

The case against the respondents rested upon the following evidence:

Alberico was a member of the firm of Alberico & Funicello, wholesale grocers in Utica (R. 74–76), who dealt in sugar and five-gallon cans, among other things. Morreale, one of the convicted defendants, who was proved to have been a distiller, bought sugar and cans at Alberico's store on at least eight occasions (R. 53). In a conversation with Alberico, Morreale said, "You could have trusted me for sugar this morning," and Alberico replied, "I can't trust you because your business is too risky" (R. 52–53). At one of the stills Government officers found 55 cardboard cartons, each sufficient to contain one dozen five-gallon cans. On one of them was stenciled: "Alberico & Funicello, Utica, New York, from the Atlas Can Company, Brooklyn" (R. 39), a firm from which Alberico bought cans (R. 73). Alberico's purchases of sugar, as the court below said, "varied with the

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[1] One of these defendants filed a petition for rehearing (R. 239), which was denied (R. 242).

[2] At the conclusion of the Government's case and again at the conclusion of the entire case the respondents moved to dismiss the indictment on the ground that the evidence was insufficient to establish a case against them. These motions were denied and exceptions taken (R. 77–85, 102–104.)

activity of the stills" (R. 235). Thus, of a total of 974,300 pounds of sugar bought in 1937, about 600,000 pounds were bought during January, February, March, and the first week in April (R. 140), when several of the stills were in operation (R. 36–39). After three stills were raided on April 10 and 14 (R. 37–38) no more sugar was bought that month. During the following summer purchases ranged from 12,500 to 40,000 pounds per month but they rose to almost 90,000 pounds in September (R. 140) when new stills started work (Exh. 50, R. 34). Alberico's sugar was purchased from Joseph Falcone, Bonomo, a customer of Falcone, and two jobbers (R. 140).

Joseph and Salvatore Falcone were brothers who had been partners in various enterprises since 1932, including the wholesale grocery business (R. 95). In March, April, June and September of 1937, Joseph Falcone dealt in sugar, purchasing 860,000 pounds during this period (Exhs. 446–447, R. 139). Neither he nor Salvatore Falcone dealt in sugar at any other time (R. 95–97). He had only three customers: Alberico, Bonomo, who sold to Alberico, and Pauline Aiello (R. 149–154). As the court below noted (R. 235), his purchases, like those of Alberico, fluctuated with the activities of the illicit stills.[3] An investigator observed the re-

[3] Thus Joseph placed an order for 2,000 bags of sugar on April 8, 1937, to be delivered in two installments each of 1,000 bags on April 12 and 19 (R. 74, Exh. Q, R. 148). On April 10 one still was raided and on April 14 two more

ARGUMENT

ONE WHO KNOWS OF THE EXISTENCE OF A CRIMINAL CONSPIRACY AND KNOWINGLY PROVIDES MATERIALS WITH WHICH THE CONSPIRACY IS CARRIED ON IS GUILTY OF THE CRIME OF CONSPIRACY

The Government contends that the present case turns ultimately on the nature of accessorial assistance and that the decision of the court below conflicts with established principles of liability for such assistance.

It is well settled that one who knows of the existence of a criminal conspiracy and knowingly aids in effectuating any of its objects is responsible as a coconspirator and that it is immaterial whether the aid is rendered by acts otherwise innocent [6] or culpable.[7] The validity of this rule of criminal liability does not depend on the sufficiency of the acts of assistance to evidence an actual agreement

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[6] *Simpson* v. *United States*, 11 F. (2d) 591 (C. C. A. 4th), certiorari denied, 271 U. S. 674 (loan of a car to transport liquor); *Pattis* v. *United States*, 17 F. (2d) 562 (C. C. A. 9th), certiorari denied, 274 U. S. 750 (sale of raw materials); *Hubinger Company* v. *United States*, 64 F. (2d) 772 (C. C. A. 7th) (same); *Borgia* v. *United States*, 78 F. (2d) 550 (C. C. A. 9th), certiorari denied, 296 U. S. 615 (same); *Marino* v. *United States*, 91 F. (2d) 691 (C. C. A. 9th), certiorari denied, 302 U. S. 764 (permission to use premises for storage and re-canning of alcohol).

[7] *Rudner* v. *United States*, 281 Fed. 516 (C. C. A. 6th), certiorari denied, 260 U. S. 734; *Anstess* v. *United States*, 22 F. (2d) 594 (C. C. A. 7th); *Comeriato* v. *United States*, 58 F. (2d) 557 (C. C. A. 4th), certiorari denied, 286 U. S. 566; *Robinson* v. *United States*, 94 F. (2d) 752 (C. C. A. 5th), all of which involved the unlawful sale of liquor.

or combination to achieve the ulterior criminal end. It rests on the narrow ground, infrequently expressed,[8] that under the rule embodied in Section 332 of the Criminal Code (U. S. C., Title 18, Section 550) whoever "aids, abets, counsels, commands, induces, or procures" the commission of an offense against the United States is guilty of that offense as a principal.[9] When the offense thus aided is criminal conspiracy, the person who knowingly aids is guilty of conspiracy. Conspiracy is not only one of the bases of complicity in other crimes; it is a substantive crime itself.

Hence it is only in the case where a conviction of conspiracy rests on proof of knowingly assisting an *individual* in the furtherance of an unlawful purpose that the act of assistance must itself import that agreement or concert of action (*Gebardi* v. *United States*, 287 U. S. 112, 121) without which no conspiracy exists. For there is then no existing conspiracy to which the defendant becomes a

[8] But see *Cardinal* v. *United States*, 50 F. (2d) 166, 168, 169–170 (C. C. A. 8th); *Borgia* v. *United States*, 78 F. (2d) 550 (C. C. A. 9th), certiorari denied, 296 U. S. 615; *Marino* v. *United States*, 91 F. (2d) 691 (C. C. A. 9th), certiorari denied, 302 U. S. 764. That Section 332 is not more frequently mentioned in conspiracy cases is adequately explained by the fact that conspiracies always involve multiple parties and the law of accessorial liability has therefore inevitably become an integral part of the law of conspiracy.

[9] It is well settled that persons liable under this section may be indicted as principals. *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 192; *Greenberg* v. *United States*, 297 Fed. 45 (C. C. A. 8th); *O'Brien* v. *United States*, 25 F. (2d) 90 (C. C. A. 7th).

finer's date marks on two bags (R. 70) of a batch sold to Bonomo and delivered on September 15, under Joseph's own supervision (R. 66). Bags bearing one of the marks were found at a still raided September 30 (R. 40) and another raided January 17 (R. 43).[4] The sugar sold by Joseph to Bonomo and by Bonomo to Alberico changed hands at prices 35 to 50 cents per bag above those at which Alberico was then buying sugar elsewhere (R. 149–152, 140), although the average resale profit was only 10 to 15 cents a bag (R. 76). Moreover, at the time of his sugar transactions Joseph associated with two of the conspirators, John Melito (R. 66, 68) and Grimaldi (R. 66), who were distillers. For Grimaldi, who was Salvatore's brother-in-law (R. 69), he also had endorsed a note (R. 97). He frequented the restaurant at which many of the conspirators met (R. 55, 42) and associated with Sam Grio, its proprietor (R. 66).

Salvatore Falcone was closely related to Joseph in the conduct of the sugar business, as he had been in previous ventures (R. 95). Each held a power of attorney on the other's bank accounts (Exhs.

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were raided (R. 37–38). Delivery of the first 1,000 bags was postponed to April 25, and the second 1,000 canceled (R. 74). Another order for 1,000 bags was placed on September 10 (Exh. 446, R. 139), two days after arrangements had been made for water service to a new still (Exh. 50, R. 34).

[4] The record states January 17, 1939. This is an obvious typographical error. The year is 1938, as the chronological sequence of the reports (R. 31–52) makes clear.

398–399, R. 124–126). Salvatore drew two checks on Joseph's account bearing on their face the notation that they were in payment for sugar (Exhs. 407, 410, R. 127–128). Salvatore was present at the home of John Melito, one of the convicted distillers, along with Joseph and Grio (R. 67).

Nicholas Nole was the proprietor of Acme Yeast Company, whose proprietorship he falsely registered in the name of a cousin who had no part in the business (R. 73). Acme Yeast wrappers, which had been provided by Nicholas Nole himself (R. 73) were found at one of the stills (R. 42). Nicholas Nole was also the proprietor of "Utica Freight Forwarding Company," the addressee of a consignment of one and one-half tons of "K & M" imported keg yeast (R. 73), a brand found at some of the stills (R. 46, 49); the order for this consignment of yeast had been placed in the name of an unidentified person (R. 73). There was evidence of association of Nicholas Nole with several of the convicted distillers, including Melito (R. 55, 64–65, 68), during the summer and fall of 1937, the period of operation of at least one of the above stills (R. 217). On one occasion during the period of these associations, Nicholas Nole sold and delivered illicit alcohol from a source not stated (R. 56).

John Nole was a distributor for National Grain Yeast Company in the Utica area during the years 1937 and 1938 (R. 62–63) when yeast wrappers bearing the National label were found at three of

the raided stills (R. 35, 40, 44). There was evidence that he assisted his brother Nicholas at Utica Freight Forwarding Company in unloading keg yeast there (R. 64), that he frequented Grio's restaurant (R. 55) and was present with the convicted conspirator Morreale, a distiller, when Morreale obtained keg and carton yeast from a store in Utica; and that on one such occasion he ordered the person in the store to let Morreale have the yeast (R. 54). John Nole's information returns on yeast, furnished to National Grain Yeast Company and furnished by the company in turn to the Government, showed no yeast whatsoever sold to Morreale nor any sales of yeast in kegs (R. 63).

The Circuit Court of Appeals apparently held that the evidence was insufficient to permit a jury to find that any of the respondents were parties to the actual plan to distill illicit spirits and considered whether they were nevertheless responsible, as a matter of law, if they sold materials with knowledge that they were supplying the unlawful venture.[5] The court held that the evidence was sufficient to establish such knowing sales by the respondent Alberico and assumed that it was sufficient with respect to the other respondents as well, although doubt was specifically expressed in the

[5] The trial court charged (R. 104–112), in the usual form, that a defendant was guilty if he planned with others to produce spirits in violation of the internal revenue laws or if, knowing of the existence of such a plan, he did any act, though innocent in itself, to further its execution (R. 107, 108, 111).

case of Salvatore Falcone. The decision was that evidence of knowing sale to the members of a conspiracy is legally insufficient to establish responsibility for the buyers' crime. Stating the question as "whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abettor of—the buyer because he knows that the buyer means to use the goods to commit a crime" (R. 236), the Court said "that the seller's knowledge was not alone enough"; that it "is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome"; "that morally the defendants at bar should have refused to sell illicit distillers; but, both morally and legally, to do so was *toto coelo* different from joining with them in running the stills" (R. 237).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding, as a matter of law, that one who sells materials with knowledge that such materials will be used in the production of illicit distilled spirits pursuant to a conspiracy to violate the internal revenue laws may not properly be convicted as a conspirator.

2. In holding, as a matter of law, that one who sells materials with knowledge that they will be used in the operation of illicit stills pursuant to a conspiracy is not criminally responsible as a co-conspirator unless he otherwise promotes the unlawful venture by joining in the operation of the stills, by making the venture his own, or by having a stake in its outcome.

3. In holding that the conviction of the respondents as members of the conspiracy charged in the indictment was improper.

4. In reversing, as to respondents, the judgments of conviction in the District Court.

SUMMARY OF ARGUMENT

It is well settled that one who knows of the existence of a criminal conspiracy and knowingly aids in effectuating any of its objects is guilty of conspiracy; and that it is immaterial whether the aid is rendered by acts otherwise innocent or culpable. This rule is based upon the rule embodied in Section 332 of the Criminal Code that one who assists in the commission of a crime becomes a party to the crime. If the crime assisted is conspiracy, he is guilty of conspiracy. The ultimate issue in the present case is, therefore, whether the sale of materials with knowledge that they will be used by the buyer to commit a crime "aids" in the commission of the buyer's crime within the meaning of Section 332. The decision of the court below holds, in effect, that they do not—unless the

seller is motivated by a desire to further the buyers' criminal purpose. This subjective qualification of the scope of accessorial liability is contrary to the authorities in the other circuits and has no support in the considerations which underlie the punishment of accessorial assistance.

The Government does not deny that such assistance must be intentional for criminal responsibility to attach. But it is familiar law that for most of the purposes of criminal liability a consequence is intended when the actor knows that it will follow from his act. The presence or absence of a "stake" in the success of the enterprise assisted is relevant only as evidence of the defendant's knowledge of its criminal nature.

The rule of liability for which the Government contends does not require conviction of all persons who knowingly render assistance which is trivial or immaterial. On the evidence in the present case and the assumptions of fact made by the court below there were repeated instances of knowing sales evidencing an interest in the continuity of the criminal enterprise. Nor does the rule of liability urged by the Government deny that some degree of knowing assistance may in special circumstances be justified. But the decision of the court below confers a broad and unwarranted immunity upon men who knowingly facilitate the commission of crimes. The fact that conspiracy prosecutions may sometimes be abused does not justify this result.

party by virtue of Section 332; and liability under that section attaches only for the substantive offense if it is committed by the person assisted.[10] This qualification is, however, immaterial in the present case. The only view of the assumptions of fact made by the Circuit Court of Appeals which is reasonable in the light of the record is that the respondents knew that directly or indirectly they were selling to persons who were themselves engaged in a conspiracy to produce illicit spirits. The ultimate issue is, therefore, whether the sale of materials with knowledge that they will be used by the buyer to commit a crime "aids" in the commission of the buyer's crime within the meaning of § 332. The issue turns not on the nature of conspiracy but on the nature of accessorial assistance.[11]

Under the decision below the sale of materials essential to the commission of a crime with knowledge that they will be used by the buyers for criminal purposes does not constitute accessorial assistance; the seller must in addition "in some sense promote their venture, himself, make it his own,

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[10] Cf. *Louie* v. *United States*, 218 Fed. 36 (C. C. A. 9th); *Di Bonaventura* v. *United States*, 15 F. (2d) 494, 496 (C. C. A. 4th).

[11] The court below postulated a complete equivalence between the conspiratorial and the accessorial relationships both in the instant case (R. 236) and in its earlier decision in *United States* v. *Peoni*, 100 F. (2d) 401, 403. Though the relationships frequently overlap, this equivalence is, in the Government's view, overstated.

have a stake in its outcome." The meaning of this additional requirement is more fully explained in the court's earlier opinion in *United States* v. *Peoni,* 100 F. (2d) 401, cited as controlling authority in the present case. There, after discussing various formulations of the definition of an accessory, including that embodied in Section 332 of the Criminal Code, the court said: "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself w h the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude toward it" (p. 402). The essence of the rule declared by the court below is, therefore, that however extensive the defendant's knowledge of the existence of a criminal enterprise, however fully he knows that his action will further its purpose, and however essential the assistance which he actually renders, he is not responsible as an accessory unless, in addition, his action is motivated by a wish to further the criminal purpose. The rule of liability thus enunciated by the court below is contrary to the great weight of authority and has no support in the considerations which underlie the punishment of accessorial assistance.

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First: Many decisions hold, as the opinion below concedes, that one who supplies materials for the commission of a crime with knowledge of their intended use, "aids" in the commission of the crime and is guilty as an accessory. No distinction has been drawn between aiding conspiracy and aiding other crimes. The rule has been applied without hesitation to acts otherwise innocent,[12] such as the sale of raw material in the instant case, or the rental of real property with knowledge that it will be used for distilling, smuggling, prostitution, or counterfeiting.[13] As the court said in *Vukich* v. *United States,* 28 F. (2d) 666, 669 (C. C. A. 9th), certiorari denied, 279 U. S. 847: "The business of a distillery cannot be carried on without supplies. It follows that one who knowingly delivers supplies to such distillery aids and abets the carrying on of its unlawful business, and thus becomes, under the provisions of the statute [Criminal Code, Section 332], liable to be prosecuted and punished as a principal." This view of the law may indeed have been accepted by this Court in its *per curiam* decision in *Edenfield* v. *United States,* 273 U. S. 660, though for reasons

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[12] See *Vukich* v. *United States*, 28 F. (2d) 666 (C. C. A. 9th), certiorari denied, 279 U. S. 847, and the cases cited in note 6, *supra*, p. 12.

[13] *Reynolds* v. *United States*, 282 Fed. 256, 257 (C. C. A. 6th); *Steir* v. *United States*, 2 F. (2d) 149 (C. C. A. 1st); *Brady* v. *United States*, 41 F. (2d) 449 (C. C. A. 7th); *Cardinal* v. *United States*, 50 F. (2d) 166 (C. C. A. 8th).

explained in the margin the Government does not cite the decision as controlling.[14]

In none of the decisions in any of the other circuits is it suggested that a defendant who knowingly renders assistance must do so for the sake of furthering the criminal enterprise rather than

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[14] The case involved three indictments, each containing two counts, the first count charging a conspiracy to manufacture liquor and the second to manufacture liquor without making a permanent record. Edenfield was convicted and sentenced on both counts of the indictment. The trial judge charged, among other things, that the jury could convict upon proof that Edenfield did no more than sell materials with knowledge that they would be used for the illicit production of liquor (R. 72). This portion of the charge was assigned as error, but the conviction was affirmed *in toto* by the Circuit Court of Appeals for the Fifth Circuit (8 F. (2d) 614). On writ of certiorari the Government conceded that the second or recording counts of the indictments could not be sustained in view of the then recent decision in *United States* v. *Katz*, 271 U. S. 354. This Court reversed the conviction on these counts and remanded the case to the District Court for resentencing on the first count of each of the three indictments. But with respect to the first count, the Government argued in this Court, in its brief on the merits, that there was much evidence in the record of agreement and participation by the defendant, in addition to the evidence of sales; and that this additional participation made it unnecessary to consider the sufficiency of the sales themselves. Since the charge of the trial court included, in addition to the challenged portion, a general charge on conspiracy, the Government argued in effect that an error on the issue of knowing sale, if error there was, would not have been prejudicial. It is impossible to tell whether in sustaining the conviction on the first counts this Court rested on the ground that the full charge was correct or on the ground that even if erroneous in part the error would not have warranted reversal in view of the state of the record.

for the achievement of his own immediate ends; or that he must have some stake in the success of the enterprise. It is enough that he knowingly furthers the criminal design. Thus, in *Backun* v. *United States,* 112 F. (2d) 635 (C. C. A. 4th), decided since the decision below, the defendant sold property to one Zucker, knowing it to have been stolen. Zuker transported the property in interstate commerce and both were charged with violating the federal statute punishing such transportation. The conviction was reversed on other grounds, but Backun's responsibility under Section 332 of the Criminal Code was expressly sustained. The illuminating opinion of the court repays attention; it said (p. 637):

> Whether one who sells property to another knowing that the buyer intends to use it for the commission of a felony renders himself criminally liable as aiding and abetting in its commission, is a question as to which there is some conflict of authority. See *United States* v. *Falcone, supra.* It must be remembered, however, that guilt as accessory before the fact has application only in cases of felony; and since it is elementary that every citizen is under moral obligation to prevent the commission of felony, if possible, and has the legal right to use force to prevent its commission and to arrest the perpetrator without warrant, it is difficult to see why, in selling goods which he knows will make its perpetration possible with knowledge that they are to be used for that purpose, he is not aiding and abet-

ting in its commission within any fair meaning of those terms. Undoubtedly he would be guilty, were he to give to the felon the goods which make the perpetration of the felony possible with knowledge that they would be used for that purpose; and we cannot see that his guilt is purged or his breach of social duty excused because he receives a price for them. In either case, he knowingly aids and assists in the perpetration of the felony.

Guilt as an accessory depends, not on "having a stake" in the outcome of crime, as suggested in the *Falcone* case, *supra,* but on aiding and assisting the perpetrators; and those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them, having a stake in the fruits of their enterprise. To say that the sale of goods is a normally lawful transaction is beside the point. The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between

> such a case and any other case of a seller who knows that the purchaser intends to use the goods which he is purchasing in the commission of felony. In any such case, not only does the act of the seller assist in the commission of the felony, but his will assents to its commission, since he could refuse to give the assistance by refusing to make the sale. This is the view taken of the matter in a number of well considered cases in the federal courts. * * * It is in harmony with the well settled rule that one who, with knowledge of the existence of a conspiracy, aids in carrying out its unlawful design makes himself a party thereto. *Simpson* v. *United States,* 4 Cir. 11 F. 2d 591.

Not even *Young* v. *United States,* 48 F. (2d) 26 (C. C. A. 5th), upon which the court below relied, sustains the position it took. For in that case the majority of the court expressly pointed out that there was no evidence that the buyers of the materials sold by the defendant were engaged in a criminal conspiracy rather than in the individual manufacture of illicit spirits. If there was no existing conspiracy known to the defendant, there was no basis for convicting him as an accessory to an existing conspiracy; and there was no evidence that he actually conspired with anyone himself. That this is a significant distinction is fully indicated by the opinion of Judge Parker in *Di Bonaventura* v. *United States,* 15 F. (2d) 494, 496 (C. C. A. 4th), a decision which would otherwise be

incompatible with his opinion in *Backun* v. *United States, supra.*[15]

It is also doubtful whether the decision is supported by that of the Court of Criminal Appeals in *Rex* v. *Lomas,* 23 Cox. Cr. Cas. 765, relied on by the court below in the *Peoni* case. Fuller reports of that case (see 9 Crim. App. R. 220; 58 Sol. J. 220; 30 T. L. R. 125; 110 L. T. 239; 78 J. P. 152) make clear that in quashing the burglary conviction of the accused, who had given back to a burglar a jimmy which the burglar had lent him, the court rested upon the ground that while the defendant may have known that the burglar was likely to use the jimmy to commit further crimes, he had no knowledge of his intention to commit the particular burglary for which the accessorial charge was made. Whether or not the vagueness of his knowledge was a proper basis for exculpation, the decision is obviously inapplicable where, as here, the defendants are assumed to have known of the existence of a continuing crime.[16]

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[15] Judge Parker's specific statement that Di Bonaventura had no knowledge of the existence of a conspiracy (15 F. (2d) 494, 496) was, we submit, ignored by the court below in relying on the decision for support in *United States* v. *Dellaro*, 99 F. (2d) 781, in which a judgment convicting a landlord who knew that the leased premises were being put to unlawful use but failed to evict, was set aside.

[16] The only other decisions relied on in the *Peoni* case are *State* v. *Coleman*, 126 Fla. 203, in which the installation of telephone service in a gambling house with knowledge that the telephone was to be used for the transmission of horse-

In what has been said the Government does not deny that accessorial assistance must be "intentional" for criminal responsibility to attach (see *Hicks* v. *United States,* 150 U. S. 442). It is, however, familiar law that for most of the purposes of criminal responsibility a "consequence" is intended when the actor knows that the consequence is highly likely to follow from the act (see *Abrams* v. *United States,* 250 U. S. 616, 621; *United States* v. *Patten,* 226 U. S. 525, 543), and even more clearly, when he knows, as in the present case, that the consequence is substantially certain to follow. See Cook, *Act, Intention and Motive in the Criminal Law,* 26 Yale L. J. 645, 657–658; Perkins, *A Rationale of Mens Rea,* 52 Harv. L. Rev. 905, 911;

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race information for gambling purposes, was held not to constitute accessorial aid to the operators of the house; and *Graves* v. *Johnson,* 179 Mass. 53, a civil suit in which the seller recovered the price of liquor which he knew the buyer intended to resell in a neighboring state where such sale was unlawful, but the seller was indifferent to the buyer's purpose. It is enough to say of these decisions that *State* v. *Coleman* relies solely on *Commonwealth* v. *Western Union Telegraph Co.,* 112 Ky. 355, in which the same result was reached in partial reliance upon the company's statutory obligation as a common carrier to serve all comers under penalty for refusal, and that apart from the presentation of a special problem of justification it is contrary to *State* v. *Scott,* 80 Conn. 317; and, as to the *Graves* case, that the availability of the seller's civil remedy in an action for the price does not depend solely on the criminality or non-criminality of the sale. See Williston, *Contracts,* Sec. 1754; Gellhorn, *Contracts and Public Policy,* 35 Col. L. Rev. 679.

Hall, *The Reckless Motorist,* 31 Journ. Crim. L. & Crim., 133, 134. In the absence of special circumstances, which Mr. Justice Holmes, dissenting, thought to be present in the *Abrams* case, *supra,* he recognized that "the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not" (250 U. S. at 626, 627). See also, Holmes, *The Common Law,* 50 *et seq.* The Government does not contend that accessorial liability exists in the absence of actual knowledge of the existence of a criminal plan which will be furthered by the acts of assistance,[17]

[17] There is thus no point to the statement of the court below (R. 237) that "Civilly, a man's liability extends to any injury which he *should* have apprehended to be *likely* to follow from his acts. If they do, he must excuse his conduct by showing that the interest that he was promoting outweighed the dangers which its protection imposed upon others; but in civil cases there has been a loss and the only question is whether the law shall transfer it from the sufferer to another." [Italics ours.] The Government does not argue that it is enough for accessorial liability that the defendant *should* have known that he was aiding a criminal plan. But with respect to the underlying thought that the case for criminal responsibility is always

but it does contend that when such knowledge exists, assistance is intentionally given and, in the absence of justification, criminal responsibility ensues.

Under the theory of liability for which the Government contends the presence or absence of a "stake" in the success of the criminal enterprise, one of the elements emphasized by the court below, is of no legal significance in itself, though it is of important evidentiary significance in determining whether the defendants in fact knew that their acts rendered assistance in the effectuation of a criminal purpose. But knowledge can obviously be proved in other ways, as the court below of necessity assumed in the present case. If such knowledge exists, the acts of assistance are criminal under Section 332 of the Criminal Code, and if the known criminal enterprise is a conspiracy, the defendant becomes a participant in the conspiracy. It does not necessarily follow that a single act of assistance makes a defendant a participant in the

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weaker than that for civil liability, it is well to contrast the familiar observation of Justice Holmes in comparing civil and criminal negligence: "If this is the rule adopted in regard to the redistribution of losses, which sound policy allows to rest where they fall in the absence of a clear reason to the contrary, there would seem to be at least equal reason for adopting it in the criminal law, which has for its immediate object and task to establish a general standard or at least general negative limits of conduct for the community, in the interest of the safety of all." *Commonwealth* v. *Pierce*, 138 Mass. 165, 176.

conspiracy for all time. Any participant in a conspiracy can put a stop to liability by affirmative withdrawal (cf. *Hyde* v. *United States,* 225 U. S. 347, 368; *Eldredge* v. *United States,* 62 F. (2d) 449, 451 (C. C. A. 10th)), and it may be that in the case of a single act of assistance—without further agreement in the plan—the rigor of the usual rule with respect to withdrawal would be relaxed.

Nor does the rule of liability demand conviction of all those hypothetical people who fix the leaking roof at the still or sell the gambling house one pack of cards, even should those persons know the nature of the enterprise they are assisting. While the decisions relied upon by the Government speak, for the most part, in terms of "any" assistance, this, like all legal formulae, must be construed in a reasonable way. Cases may easily be put in which the degree of assistance rendered is so trivial that court or jury would be warranted in treating it as legally immaterial. The charwoman who, in the ordinary course of her duties, cleans the offices which the conspirators use is not to be held criminally responsible, even if she knows of the criminal plan, merely because it is of some value to the conspirators to have their offices cleaned. Cf. *Jindra* v. *United States,* 69 F. (2d) 429, 431 (C. C. A. 5th). The problem at this stage calls for the same kind of judgment upon matters of degree that is "constantly met in other relations" and "cannot be escaped by the adoption of any artificial

rule" (*Santa Cruz Co.* v. *Labor Board,* 303 U. S. 453, 467, 468). It does not differ in nature from the familiar problems of the law of negligence and proximate causation. In determining the materiality of assistance as in the analysis of causation there are points of "remoteness" beyond which the tracing of responsibility for consequences is unwarranted either because the imposition of liability would impose an undue burden of forebearance or because it would so far transcend common conceptions of culpability that a rule of liability could not actually be enforced. Such problems are more readily solved by the restraint of prosecutors and the common conscience of court and jury than by a definitive rule of law. It is enough that in the present case, on the assumptions of fact made by the Circuit Court of Appeals, the assistance knowingly rendered by the respondents was a significant contribution, indeed, an indispensable contribution, to the fruition of the criminal plan. As this Court said in *Santa Cruz Co.* v. *Labor Board,* 303 U. S. 453, 467, *supra,* there is "no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialetic of suggesting doubtful and extreme cases."

Moreover, while the Government contends that a single act of substantial assistance suffices for liability, there was far more in the present case on

the evidence in the record and the assumptions of fact made by the Circuit Court of Appeals. There were repeated sales of sugar, yeast, and cans. Assuming, as the Circuit Court of Appeals did, that the respondents knew that they were supplying the illicit distillers, they must also have known that the purchases made by the distillers constituted a substantial source of their trade. In that event, the respondents had a genuine interest in the continuity of the illegal venture. They could not have been indifferent to the continuous existence of their market unless they were also indifferent to their future profits and the continuation of their own business. That this was not thought to establish a "stake" in the outcome of the criminal enterprise, within the meaning of the rule of liability enunciated by the Circuit Court of Appeals, strikingly illustrates the narrow confines of that rule. Indeed, it is difficult to reconcile the decision on this score with that rendered shortly before by the same court in *United States* v. *Bruno*, 105 F. (2d) 921, reversed on other grounds, 308 U. S. 287. There the defendants convicted of a conspiracy to import, sell, and possess narcotics comprised four groups: The smugglers who made cash sales to the "middlemen," the "middlemen who paid the smugglers and distributed to retailers," the retailers in New York, and the retailers in Louisiana and Texas. Although there was no evidence that either group of retailers knew of the existence of the

other, or that the smugglers knew who the retailers were, the court held that they were all part of a single conspiracy on the ground that they were all "embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of that part with which he was immediately concerned, was dependent upon the success of the whole" [18] (p. 922). But the only interest of the smugglers in the activities of the retailers was obviously in the maintenance of a market for the middlemen who, in turn, provided a market for the smugglers.

It may also be observed that the rule of liability for which the Government contends does not deny the possibility that some degree of knowing assistance of a criminal enterprise may be justified on the ground that it serves some overriding public end. Thus, it would not be contended that a doctor who saves the life of a patient whom he knows to be an important member of a criminal conspiracy is responsible for aiding the conspiracy merely because he thus assists in the effectuation of its purposes.[19] Many rules of the criminal law require such tacit qualification to meet the special bases of justification that may be suggested as cases arise.

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[18] This was thought to distinguish the *Bruno* case from *United States* v. *Peoni*, 100 F. (2d) 401, decided shortly before. The *Peoni* case is discussed *infra*, pp. 29–31.

[19] Whether or not his failure to disclose his knowledge would be misprision of felony under Section 146 of the Criminal Code (18 U. S. C., § 251) is a separate problem. See *Neal* v. *United States*, 102 F. (2d) 643 (C. C. A. 8th).

No such problem is presented here. The fact that the respondents' acts were otherwise lawful is not in itself a justification for the reasons so fully pointed out in the *Backun* case, *supra,* and in the other decisions sustaining liability referred to above.

Nor does a decision sustaining liability in the present case necessarily conflict with the earlier decision of the court below in *United States* v. *Peoni, supra,* although the Government does not concede that the decision in that case was correct even on its own facts.[20] There Peoni sold counterfeit money to Regno in the Southern District of New York, and Regno sold it to Dorsey, also in the Southern District. Dorsey was arrested while trying to pass it in the Eastern District. Peoni was indicted for possessing counterfeit money, and for conspiring to possess it in the Eastern District. The court held that Peoni was not an accessory to Dorsey's possession or guilty of conspiring with him. While the decision rested upon the interpretation of Section 332 which the Goverment challenges here, it may be observed that when Peoni sold the bills to Regno he did not assist an existing conspiracy between Regno and Dorsey for no such conspiracy existed or was specifically contemplated at the time of his sale; nor was there any actual agreement between him and Regno that anyone else should be given possession of the bills. He

[20] See the criticism in 48 Yale L. J. 1447.

knew that it was probable to some degree that Regno might sell the bills to another rather than attempt to pass them himself, but the degree of that probability was indeterminate and there was no evidence that Dorsey was in any way known to Peoni. Thus, to hold that Peoni did not assist in the possession of Dorsey—whom he did not know—because he knew that it was probable to some degree that Regno might sell to someone else—is not the same as to hold that respondents did not assist in the crime of the conspirators whom they knew and whose unlawful use they knew to be substantially certain. The specificity of the defendant's knowledge and the degree of probability that the result will ensue are obviously material matters, since it is likely to *some* degree that almost everything that is sold may be put to unlawful use by someone at some future time.

Furthermore, the practical consequence of a decision against liability in the *Peoni* case was only to require that Peoni be prosecuted in the Southern District for his own possession and perhaps for a conspiracy with Regno. The question was not as to the criminality of Peoni's conduct, but only as to the form and place of his prosecution. In determining that question considerations as to the proper place of trial and the policy which underlies the Sixth Amendment may conceivably determine the result. But in the present case the decision against liability determined not the nature of the accusation or the place of the trial but the criminal-

ity or noncriminality of the respondent's acts. Under the decision of the court below, men are free to contribute to the perpetration of crimes by knowingly rendering assistance unless Congress has chosen by specific legislation to proscribe the particular form of assistance in question.

Second: The decision of the court below has no support in the considerations that underlie the punishment of accessorial assistance. The punishment of accessories obviously rests upon the importance for the prevention of crime of deterring acts which facilitate their commission; and further upon the significance of acts of accessorial assistance as evidence of further criminal potentialities of the persons who perform them. Neither consideration supports the qualification of the rule of liabiilty advanced by the court below. The danger that acts of assistance will further the commission of crimes does not depend upon the actor's motive to further the criminal ends or upon his stake in their achievement. It depends upon the degree to which the acts of assistance actually facilitate the commission of the crime.[21] Similarly, the further criminal potentialities of the actor, evidenced by his acts, do not depend solely upon his motives, though his motives may be a relevant factor in estimating their strength; they also depend upon general character shown by the nature of the activities which he knowingly furthers.

[21] The requirement of knowledge, which the Government concedes, affords adequate protection of innocence.

The Circuit Court of Appeals alluded to quite different considerations. In the principal case the court emphasized the importance of its qualified rule of liability "today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree what ever with the main offenders. That there are op portunities of greater oppression in such a doctrine is very plain, and it is only by circumscribing the scope of all of such comprehensive indictments that they can be avoided." (R. 237.) In the *Peoni* case the court referred to the danger that a broad rule of accessorial liability may lead to the trial of an offender "thousands of miles away. The oppression against which the Sixth Amendment is directed could be easily compassed by this device, because if the seller be a real accessory he may be removed to the place of the crime." These may both be genuine problems. See *Gebardi* v. *United States,* 287 U. S. 112, 122, note 7. But if they are, a substantive rule of liability which results in the widespread immunity conferred by the decision below upon persons who knowingly further criminal enterprise is an obviously inappropriate solution. In the first place the rule of liability for which the Government contends does not, as we have said, preclude the exculpation of persons who render trivial or justifiable assistance. In the second place, if the self-restraint of prosecutors does not suffice to avert the oppression of dragnet

prosecutions, there is ample authority both in the trial and in the appellate courts to safeguard the interests of individual defendants by severance and in other ways. In the third place, the issue of venue which this Court squarely faced in *Hyde* v. *United States,* 225 U. S. 347, and resolved by a divided Court ought not to be reopened indirectly by revising the underlying rule of liability. It cannot be emphasized unduly that the problem in situations like the instant case is not whether the defendants shall be tried along with the principal actors in the conspiracy or separately; and not, as in *United States* v. *Peoni, supra,* whether an admittedly criminal act shall be prosecuted in one form and in one place or in another. It is rather whether acts which knowingly further an existing criminal enterprise are open to prosecution at all, in the absence of the special elements made requisite by the decision below.

CONCLUSION

In the foregoing argument the Government has proceeded on the assumption made by the court below that all the respondents were parties to the sales, and that they all acted with knowledge of the unlawful purpose for which the material sold would be used. But the Circuit Court of Appeals has not, with respect to all the respondents, held that the evidence was sufficient to sustain the jury's finding of knowing sale. Whether or not it is suf-

ficient for that purpose involves an appraisal of the evidence with respect to each of the respondents which the Circuit Court of Appeals found it unnecessary to make. Under the circumstances, if this Court should sustain the Government's contention that the Circuit Court of Appeals reversed the convictions in reliance upon an erroneous rule of criminal liability, the Government respectfully submits that the appropriate disposition of the case is for this Court to reverse the judgment of the Circuit Court of Appeals and remand the case to that court for an evaluation of the evidence in accordance with the correct rule of law.[22]

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[22] See *Grant* v. *A. B. Leach & Co.*, 280 U. S. 351; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126.

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